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No. 02-516

In the Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,
PETITIONERS

v.

LEE BOLLINGER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) or 42 U.S.C. 1981?

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INTEREST OF THE UNITED STATES

The United States has the responsibility for enforcing numerous federal statutes prohibiting discrimination on account of race and ethnicity[1] and, accordingly, has frequently participated in the Supreme Court, both as a party and as amicus curiae, in cases presenting constitutional and statutory claims of discrimination.[2] The Department of Justice has significant

[1] See, *e.g.*, 42 U.S.C. 2000h-2, 2000e-5(f)(1); Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).

[2] See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103 (2001); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995);

responsibilities for the enforcement of the Equal Protection Clause of the Fourteenth Amendment in the context of public education, see 42 U.S.C. 2000c-6, including admission to public colleges and universities, and also has responsibility for enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination of the basis of race, color, or national origin by recipients of federal financial assistance. The United States Department of Education has parallel responsibility for the administrative enforcement of federal civil rights laws affecting educational institutions, including Title VI.

STATEMENT

At the time this litigation commenced, the University of Michigan received approximately 13,500 applications for admission to the College of Literature, Science and the Arts and admitted approximately 3950 students each year. Pet. App. 4a.[3] It seeks to admit a racially, ethnically, culturally, and economically mixed student body because it believes that diversity "increase[s] the intellectual vitality of [its] education, scholarship, service and communal life." *Ibid.* (citation omitted).

1. During the years relevant to this lawsuit, the University has used two different methods for admissions decisions, both of which rely on race as a significant factor and provide a preference to applicants who are members of "under-represented minority" groups, including African Americans, Hispanics, and Native

Georgia v. *McCollum*, 505 U.S. 42 (1992); *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547 (1990); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *University of Cal. Regents* v. *Bakke*, 438 U.S. 265 (1978).

[3] Respondents assert that the University currently receives in excess of 17,000 applications each year. Br. in Opp. 3.

Americans. Pet. App. 108a-109a, 111a. Under both systems, the degree to which race affects "the outcome of admissions decisions varies"; "race is dispositive in the outcome" in some, but not all, cases. *Id.* at 111a. The University's consideration of race under both systems has the effect of "admitting virtually every qualified under-represented minority applicant," or every preferred minority applicant who is deemed "qualified," or believed capable of achieving passing grades at the University, as well as selecting the most qualified non-minority applicants. *Ibid.* Both systems also ensure that preferred minority applicants are not automatically rejected regardless of their academic credentials. *Id.* at 113a, 117a-118a.

a. In 1995, 1996, and 1997, the University utilized guideline tables or grids that reflected a combination of an applicant's adjusted high school grade point average and score on the ACT or SAT college entrance examination in determining whether to admit an applicant. Pet. App. 33a, 112a.[4] For all three years, the University used different grids and admissions criteria for applicants who were members of preferred minority groups as compared to other candidates and set aside a prescribed number of seats in the entering class for the former in order to achieve its numerical target. *Id.* at 43a, 46a, 112a-114a. As a result, the University used more selective and rigorous academic admissions criteria for applicants who were not members of under-

[4] An adjusted grade point average reflects a number on a zero to 4.0 scale that is calculated after the removal of grades for certain high school courses and the addition or subtraction of points based on the quality of a candidate's high school, the strength of his or her curriculum, unusual circumstances, geographical residence, and alumni relationships. Pet. App. 33a n.15, 111a-112a.

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represented minority groups than for those who were. In 1997, the University also automatically added an additional .5 to the grade point average of every applicant who was a member of a preferred minority group. *Id.* at 33a.

b. In 1998, the University began changing its admissions program. Pet. App. 116a. It dispensed with using tables and cells in favor of a point system that determines an applicant's "selection index." *Ibid.* An applicant's "selection index" or rank on a 150-point scale generally determines whether he or she is admitted. *Id.* at 33a, 116a. The new system was not intended to alter the "the substance, of how race and ethnicity [were] considered in admissions." *Id.* at 116a (citation omitted); see *id.* at 34a n.16. Indeed, the parties agreed, "[t]he difference between the selection index and the grids * * * has no legal significance." *Id.* at 116a (citation omitted).

Under the "selection index" system, which the University still employs, the University awards applicants varying points for a variety of factors in one of three categories: "Test Score, Academic, and Other Factors." Pet. Lodging 36. Up to 12 points can be awarded under the Test Score category based on the applicant's score on the standardized ACT or SAT examination. Up to 98 points can be awarded under the Academic category based on the applicant's GPA, the category of school attended, and the strength or weakness of the curriculum. And an applicant may receive up to 40 points in the Other Factors category. Up to 20 of those "Other Factors" points can be based on a combination of factors such as geography, alumni relations, an outstanding essay, personal achievement, or leadership and service activity. The remaining 20 "Other Factors" points can be awarded under a "Miscellaneous" heading

for socio-economic disadvantage, underrepresented racial/ethnic minority identification or education, athletic scholarship, or discretionary selection by the Provost. *Id.* at 36-40; Pet. App. 116a. The University automatically awards applicants who are members of an "under-represented racial or ethnic minority group," defined as African American, Hispanic, or Native American, 20 points under this "Miscellaneous" heading. *Id.* at 33a; see *id.* at 116a-117a.

The Selection Index scale was divided linearly into ranges generally calling for admissions disposition as follows: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); 74 and below (delay or reject). Pet. App. 116a. Counselors reviewing the applications "were generally expected to and generally did conform admissions decisions to the selection index scale and retained some discretion to make departures from the scale after consulting with a supervisor." *Ibid.*

c. Beginning in 1999, the University abandoned its policy of reserving a certain number of seats for preferred minority applicants. Pet. App. 44a, 46a, 118a. It also initiated a policy of "flagg[ing]" applicants who "achieved a minimum selection index score" and "possess[] a quality or characteristic important to the University's composition of its freshman class," which includes membership in a preferred minority group, high class rank, unique life experiences, challenging circumstances, interests or talents, or socieoeconomic disadvantage. *Id.* at 33a-34a, 117a. Applicants who are "flagged" remain in the pool of eligible candidates and receive individualized consideration by the Admissions Review Committee (ARC), regardless of their selection index score. The ARC reviews only "a portion of all of the applications" the University receives, with the

"bulk" of admissions decisions being made based solely on selection index scores. *Id.* at 117a.

d. Petitioners, Jennifer Gratz and Patrick Hamacher, are unsuccessful white applicants who resided in Michigan and sought admission to the University of Michigan's College of Literature, Science and the Arts in 1995 and 1997, respectively. Pet. App. 5a. Ms. Gratz applied with an actual and adjusted high school grade point average of 3.8 and an ACT standardized test score of 25. *Id.* at 113a. The University initially "delayed" her admission and then placed her on an extended waiting list and recommended that she "make alternative plans to attend another institution" because it "expect[ed] to take very few students" from that list. *Id.* at 109a. As a result, Ms. Gratz enrolled at the University of Michigan at Dearborn and graduated in 1999. *Ibid.* The University's admissions guidelines in effect in 1995, called for the acceptance of all under-represented minority applicants with Ms. Gratz' academic credentials regardless of whether they were in-state or out-of-state candidates. *Id.* at 113a.

Mr. Hamacher applied to the University's College of Literature, Science and the Arts with an actual and adjusted high school grade point average of 3.32 and 3.0, respectively, and an ACT standardized test score of 28. Pet. App. 115a. The University initially "postponed" its admissions decision and subsequently rejected his application. *Id.* at 109a-110a. Mr. Hamacher attended Michigan State University and graduated in 2001. *Id.* at 5a. The University's guidelines in effect in 1997, called for the admission of under-represented minority applicants with Mr. Hamacher's academic qualifications. *Id.* at 115a.

2. In 1997, petitioners filed this class-action suit challenging the legality of the University's race- and

ethnic-based admissions policies and sought declarative, injunctive, and monetary relief. They alleged that the University illegally discriminated on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, 42 U.S.C. 1981, and 42 U.S.C. 1983. The parties submitted a "Joint Summary of Undisputed Facts Regarding Admissions Process" and filed cross-motions for summary judgment. Pet. App. 106a-118a.

On December 13, 2000, the district court held that the University's race-based admissions system in existence between 1995 and 1998 violated both the Equal Protection Clause of the Fourteenth Amendment and Title VI and that its current admissions program, initiated in 1999, is lawful. Pet. App. 3a, 6a. As a result, it denied petitioners' request for injunctive relief permanently barring the University from using an applicant's race or ethnic status in its admissions decisions. *Id.* at 3a.[5]

The district court held that the University has a compelling interest in enrolling a student body with diverse experiences and viewpoints. Pet. App. 9a-28a. Analyzing this Court's decision in *University of California Regents* v. *Bakke*, 438 U.S. 265, 314 (1978), the district court concluded that "there were no clear grounds upon which a majority of the Court agreed in reaching their respective decisions." Pet. App. 12a. Nonetheless, the court ruled that "no Supreme Court decision has explicitly" held that an interest in diversity "can never

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[5] The district court also granted defendants Duderstadt and Bollinger's motion for summary judgment on the ground of qualified immunity and denied the Board of Regents' motion for summary judgment on the ground of Eleventh Amendment immunity. Pet. App. 4a.

constitute a compelling state interest, especially in the context of higher education" and thus, "if presented with sufficient evidence regarding the educational benefits that flow from a diverse student body, there is nothing barring * * * [a] determin[ation] that such benefits are compelling under strict scrutiny analysis." *Id.* at 19a, 22a. Accordingly, "based upon the record before it," and "solid evidence" that "a racially and ethnically diverse student body produces significant educational benefits," the district court concluded that diversity, in the context of higher education, constitutes a compelling governmental interest. *Id.* at 28a; see *id.* at 22a, 27a-28a.

As to narrow tailoring, the district court separately analyzed the race-based admissions program in existence from 1995 through 1998 and the University's current admissions system and reached different conclusions as to their validity. Pet. App. 34a-48a. The court held that the University's current admissions program is properly structured because it uses race only as a "plus" factor by awarding 20 points to the "selection index" of applicants who are members of preferred minority groups and allowing the applications of preferred minorities to be "flagged" based solely on their race for further individualized consideration not available to most applicants. *Id.* at 35a-36a. The court relied heavily on its findings that the current admissions policy "does not utilize rigid quotas or seek to admit a predetermined number of minority students," *id.* at 34a-35a, or result in the kind of "'dual' or 'two-track' system prohibited by Justice Powell in *Bakke*," *id.* at 37a; see *id.* at 35a-39a. The court also upheld the University's policy of "flagging" minority applicants to guarantee that they remain eligible for admission and receive an additional round of individualized consideration by the ARC, noting that admissions counselors "are not *required* to flag every under-represented minority applicant" and that "flagged" applicants are not protected from competition with the remaining applicant pool. *Id.* at 39a-40a. The court also held that the University could not achieve its interest in diversity through race-neutral means, concluding that "[i]f race were not taken into account, the probability of acceptance for minority applicants would be cut dramatically." *Id.* at 40a-41a.

Finally, the district court held that the race-based admissions program in existence between 1995 and 1998 was constitutionally defective. Pet. App. 43a-48a. It explained that the University's practice of "'protecting' or 'reserving' seats for under-represented minority applicants" makes it "clear that the * * * system operated as the functional equivalent of a quota and therefore, ran afoul of Justice Powell's opinion in *Bakke*." *Id.* at 43a, 45a. It also pointed out that because the University "used facially different grids and action codes based solely upon an applicant's race" from 1995 through 1997, non-preferred minorities failed to receive any "individualized counselor review" and were "systematically exclude[d] * * * from participating in the admissions process based solely on account of their race." *Id.* at 45a-46a. In addition, the court explained that the admissions program is defective because an applicant's race was "the *only* defining factor" for the University's use of different grids and admissions criteria. *Id.* at 47a.

3. Both parties appealed. The case was briefed and argued to the Sixth Circuit, sitting en banc. The court of appeals has not issued a decision.

SUMMARY OF ARGUMENT

This case and *Grutter* v. *Bollinger*, No. 02-241, demonstrate the pernicious consequences that result when public institutions deviate from this Court's precedents by ignoring race-neutral alternatives and employing race-based policies that amount to racial quotas. As these cases demonstrate, to the extent such institutions adopt such race-based policies, they have two basic options, both of which are impermissible under this Court's precedents. First, they can employ racial quotas or set asides directly. That is the course the University chose in its 1995-1998 admissions policies, which set aside a target number of seats in each entering class for preferred minorities and shielded those minorities from competition with the rest of the applicant pool. That is the kind of two-track admissions system the Court condemned in *Bakke*. That is also the approach the Law School has taken in the *Grutter* case with its policy of enrolling a "critical mass" of preferred minority students. Second, institutions can meet such quotas indirectly by providing preferred minorities a "bonus" based solely on their race. By selecting the appropriate "bonus," a university can admit a predetermined level of minority applicants without expressly adopting an overt quota. That is the course the University has chosen in its current admissions policy. But whether the school adopts an actual quota or simply awards a race-based bonus consistent with such a quota, its admissions policy is inconsistent with this Court's precedents.

For the basic reasons outlined in the United States' amicus brief in *Grutter* v. *Bollinger*, at 8-29, the Court should reverse the decision of the district court upholding the University's current race- and ethnic-based

undergraduate admissions policy. That policy is plainly unconstitutional under this Court's precedents. The University has failed to employ race-neutral alternatives that have proven effective in meeting the important and laudable goals of educational openness, accessibility, and diversity in other States, and has instead resorted to impermissible racial quotas or their equivalent.

The district court correctly concluded that the University's 1995-1998 admissions policies were not narrowly tailored because they "'protect[ed]' or 'reserv[ed]' seats for under-represented minority applicants," "used facially different grids and action codes based solely upon an applicant's race," placed preferred minorities on a separate track that effectively shielded them from competition with the rest of the applicant pool, and "systematically exclude[d] * * * non-minority applicants from participating in the admissions process based solely on account of their race." Pet. App. 43a, 45a-46a. Thus, there is no doubt that the 1995-1998 admissions policies involved a two-track admissions system and "operated as the functional equivalent of a quota." *Id.* at 45a.

The district court erred, however, in holding that the University's 1999 and 2000 admissions policy, which remains in place today, satisfies this Court's narrow tailoring requirements. In particular, the district court erroneously concluded that the University lacked race-neutral alternatives to achieve its goal of educational diversity. The experiences of Texas, Florida, and California, and their success in maintaining truly diverse student bodies under race-neutral admissions standards, proves to the contrary. Because race-neutral alternatives remain available, the University's race-based policy is unconstitutional.

Moreover, the University's current policy also violates this Court's precedents forbidding dual-track admissions programs and racial quotas. The University automatically awards all preferred minorities, regardless of their background, academic performance, or life experiences, 20 points to their "selection index" score—or roughly the equivalent of one full grade point (on a 4.0 scale)—based solely on their race. It also provides special individualized review to preferred minority applicants not available to other applicants based solely on their race. Its predominant emphasis on race renders it functionally indistinguishable from the rigid quota system it employed between 1995-1998. Indeed, the University itself has conceded that in changing from its 1995-1998 admissions policies to its current policy, it "develop[ed] * * * the selection index" so as to "change[] only the mechanics, not the substance, of how race and ethnicity [were] considered." Pet. App. 116a (citation omitted). And under its current admissions policy, just as under its prior policies, the University's "consideration of race * * * has the effect of admitting virtually every qualified under-represented minority applicant," while denying admission to non-preferred applicants with the same or higher index scores based solely on their race. See *id.* at 111a. Other factors this Court has looked to in determining whether a program is narrowly tailored confirm that the University's policy is unconstitutional. Accordingly, however its objectives are defined, the University's race-based admissions policy violates the Equal Protection Clause.

ARGUMENT

RESPONDENTS' USE OF RACE-BASED ADMISSIONS CRITERIA IS NOT JUSTIFIED IN LIGHT OF THE AMPLE RACE-NEUTRAL ALTERNATIVES

A. Public Universities Have Ample Means To Ensure That Their Services Are Open And Available To All Americans

For the same basic reasons outlined in the United States' amicus brief in *Grutter* v. *Bollinger*, No. 02-241, at 10-21, the Court should hold that the University's race- and ethnic-based undergraduate admissions policies are unconstitutional because proven race-neutral alternatives to achieving the laudable goals of educational openness and diversity remain available. Although ensuring that public institutions, and in particular public universities, are open and available to all segments of American society represents a paramount government objective, public universities have substantial latitude to tackle such problems and ensure that universities and other public institutions are open to all individuals and that student bodies are educationally diverse and broadly representative of the public.

The district court's conclusion that "[i]f race were not taken into account, the probability of acceptance for minority applicants would be cut dramatically" is plainly mistaken. Pet. App. 40a-41a. Three of the Nation's most populous States, Texas, Florida, and California, have adopted race-neutral admissions standards for their public universities, and have maintained, or in some instances increased, minority enrollment under those race-neutral standards. See U.S. Br. in *Grutter*, at 14-17. Similarly, the district court erred by crediting

testimony from respondents' expert that Texas's race-neutral percentage enrollment plan "would not be as effective in enrolling 'an academically well prepared and diverse student body.'" Pet. App. 41a. Not only has Texas's race-neutral policy maintained or increased the number of minority students enrolled at the University of Texas, but the students enrolled through its percentage plan, including minority students, consistently outperform other students at the University of Texas with comparable standardized test scores. See Gary M. Lavergne & Dr. Bruce Walker, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin* 10-14 (last modified Jan. 13, 2003) <http://www.utexas.edu/student/research/reports/admissions/HB588-Report5.pdf>.

Under this Court's precedents, the availability of such race-neutral alternatives precludes the University's use of race in admissions. This Court has repeatedly emphasized that race-based measures are permissible only to the extent that the asserted interest may not be achieved "without classifying individuals on the basis of race." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion). See U.S. Br. in *Grutter*, at 18-21.

Accordingly, the existence of race-neutral alternatives, such as those adopted in Texas, Florida, and California, make clear that, regardless of how the University's interest in diversity is defined, respondents' policy fails this fundamental tenet of this Court's precedents.

In addition, if the University genuinely seeks candidates with diverse experiences and viewpoints, it can focus on numerous race-neutral factors including a history of overcoming disadvantage, geographic origin,

socioeconomic status, challenging living or family situations, reputation and location of high school, volunteer and work experiences, exceptional personal talents, leadership potential, communication skills, commitment and dedication to particular causes, extracurricular activities, extraordinary expertise in a particular area, and individual outlook as reflected by essays. See *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 623 (1990) (O'Connor, J., dissenting); U.S. Br. in *Grutter*, at 19-21.

B. The University's 1995-1998 Admissions Policies Were Not Narrowly Tailored Because They Operated As An Express Racial Quota

It hardly can be disputed that the undergraduate admissions programs in existence between 1995 and 1998 were not narrowly tailored. It is well settled that, even where the Constitution permits consideration of race, it generally forbids the use of racial quotas. See *Bakke*, 438 U.S. at 319-320 (opinion of Powell, J.); *Croson*, 488 U.S. at 499; *Wygant*, 476 U.S. at 276.

Nevertheless, the University acknowledges, and the district court found, that for each of those years the University expressly reserved a certain number of seats for applicants who were members of preferred minority groups. Pet. App. 44a-45a, 118a. Indeed, the University expressly conceded that "[b]ecause the class is selected on a rolling basis, rather than at one point in time, a certain number of seats is designated during the admissions cycle for * * * *underrepresented minority candidates* * * * to enable [the University] to achieve [its] enrollment targets." *Id.* at 44a (quoting Defs. Answer Interrog. No. 1).

Moreover, as the district court noted, the University's own "memoranda refer to these 'protected' seats as being 'reserved' for particular [minority] groups,"

and "one memorandum specifically states that the number of 'protected groups' for Fall 1997 would be decreased, thereby 'opening up slots for non-protected applicants.'" Pet. App. 45a (citation omitted). The University further acknowledged that (1) it determined the number of protected spaces to reserve for preferred minority and other candidates "by the expected pool size of various groups" of applicants; (2) it "carefully monitored and managed" its offers of admissions "to ensure that sufficient spaces are reserved, or protected, for attractive applicants who apply later in the cycle"; (3) "*[a]s applicants from a particular group are admitted over the course of the admissions season, the protected spaces reserved for that group are used*"; and (4) "[i]f the pool of qualified applicants never reaches the number of protected spaces, those slots are filled with qualified applicants off the wait list." *Id.* at 44a (quoting Pls. 4/9/99 Br. at 7 n.4). Accordingly, as the district court held, "[i]t is clear that the [University's] system [between 1995-1998] operated as the functional equivalent of a quota." *Id.* at 45a.

Further, from 1995-1997, the University used different grids and criteria for admitting preferred minority candidates. Pet. App. 46a, 111a-113a. Accordingly, the district court correctly held that up until 1999 the University operated a two-tier system in which favored minority applicants were insulated from competition with other candidates because race was a determinative factor in admissions decisions. See *Bakke*, 438 U.S. at 315-320 (opinion of Powell, J.); *Croson*, 488 U.S. at 499; *Wygant*, 476 U.S. at 276. Moreover, the district court correctly concluded, the University's admissions systems in place between 1995-1998 constituted an "impermissible use of race" because they "systematically exclude[d] a certain group of non-

minority applicants from participating in the admissions process based solely on account of their race." Pet. App. 43a, 46a.

For example, statistics from 1995, the year Ms. Gratz applied, reflect that the University accepted all 46 applicants who were members of preferred minority groups and had the same adjusted GPA and test score, but only accepted slightly less than one third, or 121 of 378 non-preferred candidates. See Pet. App. 47a (holding University's admissions program in effect in 1995 and 1996 defective in part because non-preferred applicants were "automatically rejected, whereas * * * minority applicant[s] with the same grade/score would have most likely been admitted").

C. The University's Current Admissions Policy Is Also Unconstitutional

The University's current undergraduate admissions program shares many of the same defects as the prior program and, in any event, cannot be squared with this Court's precedents. It ignores available race-neutral alternatives and amounts to a forbidden racial quota. More broadly, the program provides an enormous, inflexible bonus to students solely on the basis of race. On its face, the 20-point raced-based bonus automatically added to the selection index scores of all preferred minority applicants, without regard to their background, academic performance, or life experiences, is plainly unconstitutional. That 20-point racial bonus is roughly the equivalent of raising a candidate's grade point average one full point on a 4.0 scale and has 20 times the weight of an outstanding application essay. See Pet. Lodging 36-40.

1. *The University's admissions policy ignores race-neutral alternatives*

First and foremost, the University's race-based bonus system is unconstitutional because it ignores the ample race-neutral alternatives available. As outlined in the Government's amicus brief in *Grutter*, at 10-17, universities in Texas, Florida, and California have employed race-neutral means to ensure that minorities have access to institutions of higher learning. The University's failure to consider these efficacious alternatives renders its use of race unnecessary and its admissions policy unconstitutional. See *id.* at 18-21.

2. *The University's admissions policy represents a forbidden quota*

In addition, the admissions policy provides that preferred minority applicants who have a "minimum selection index score" may be "flagged" for additional, individualized review by the Admissions Review Committee (ARC) solely because of their race, while other candidates with the same or better index scores are denied any individualized review and, in fact, are automatically rejected. Pet. App. 117a. Indeed, because the University acknowledges that "[t]he bulk of admissions decisions are executed based on selection index score parameters" and "[t]he ARC reviews only a portion of all of the applications," the University's policy of "flagg[ing]" preferred minority students based solely on their race appears to create a dual admissions system where preferred minority students receive individualized review, while non-preferred candidates with similar or better index scores are denied such consideration and, indeed, are automatically rejected. *Ibid.*; see *Bakke*, 438 U.S. at 318 n.52 (opinion of Powell, J.) (explaining that "the principal evil" of the Medical

School's race-based admissions program is that it denies non-preferred applicants "individualized consideration without regard to race"); Pet. App. 46a-47a (holding University's admissions policy in existence between 1995-1997 defective in part because non-favored applicants could be "automatically rejected" while "all minority applicants received some type of individualized counselor review").[6]

Taken together, the University's substantial race-based "bonus" and its practice of providing preferred minorities special, individualized review denied to non-preferred applicants leaves little doubt that the University's current admissions policy operates as a disguised racial quota. Indeed, as if to remove any doubt on the question, the University has conceded that in changing from the open quota system it employed between 1995-1998 to its current selection-index system, it "develop[ed] * * * the selection index" so as to "change[] only the mechanics, not the substance, of how race and ethnicity [were] considered." Pet. App. 116a (citation omitted); see *ibid.* ("The difference beween the selection index and the grids [the University employed in 1995-1997], therefore, has no legal significance."). Rather than adopt a particular overt quota, the University now employs a race-based bonus designed to achieve the same result. After all, adding 20 points has no independent significance apart from its effect on the number of preferred minority students

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[6] The district court opinion does not reflect how often the University "flags" applicants merely because of their race, as opposed to race-neutral factors, or whether there are significant differences in the academic qualifications of those who are "flagged" and ultimately admitted based on the applicant's being a member of an under-represented minority group.

admitted. Selecting the "correct" race-based bonus generates the "correct" number of minority students.

Moreover, the record reflects that the change from the overt quota system employed between 1995-1998 to the "selection index" system now in place has not affected the overwhelming role race plays in the University's admissions process. Rather, under each of the admissions systems at issue in this lawsuit, "[i]t is undisputed that the University's consideration of race in the admissions process has the effect of admitting virtually every qualified under-represented minority applicant," while denying admission to non-preferred applicants with the same or better qualifications based solely on their race. Pet. App. 111a. Accordingly, under the current admissions policy, just as under the prior policies, an applicant's race or ethnic status is an extraordinarily important factor in admissions decisions and, by the University's own admission, may be the "dispositive" factor. *Ibid.*

That the University has attempted to disguise its racial quota in its current selection-index system does not make its use of race any more narrowly tailored than in its prior open-quota admissions policies. Rather, just as with University's prior admissions policies and the Law School's admissions policy at issue in *Grutter*, the University's automatic, inflexible, and overwhelming reliance on race in its current admissions policy fails to satisfy the remaining narrow-tailoring factors identified by this Court.

3. *The University's admissions policy would permit race-based discrimination in perpetuity*

The University's admissions policy is also not narrowly tailored because its reliance on race-based decisionmaking "has no logical stopping point" and would permit racially discriminatory admissions standards in perpetuity. *Croson*, 488 U.S. at 498 (quoting *Wygant*, 476 U.S. at 275 (plurality opinion)); *Metro Broad.*, 497 U.S. at 613, 614 (O'Connor, J., dissenting); see U.S. Br. in *Grutter*, at 25-27. The University's policy "provides no guidance [as to] the * * * scope of the [preference]" or how long race must be relied upon to attain the University's diversity-related goals. *Croson*, 488 U.S. at 498 (quoting *Wygant*, 476 U.S. at 275 (plurality opinion)). Indeed, the logic and inevitable outcome of the University's policy would permit it to rely on racial and ethnic admissions preferences indefinitely to obtain and sustain any racial balance, including proportional representation or "outright racial balancing," it believes contributes to its educational mission. *Metro Broad.*, 497 U.S. at 625 (O'Connor, J., dissenting) (quoting *Croson*, 488 U.S. at 507); see *Wygant*, 476 U.S. at 276 (plurality opinion) (rejecting rationale that would permit race-based decisionmaking "ageless in [its] reach * * * and timeless in [its] ability to affect the future"); accord *Tuttle* v. *Arlington County Sch. Bd.*, 195 F.3d 698, 706 (4th Cir. 1999), cert. dismissed, 529 U.S. 1050 (2000). This Court has never found such open-ended and potentially unlimited racial preferences narrowly tailored.

4. *The University's admissions policy places an automatic, inflexible, and disproportionate emphasis on race*

Another factor this Court has looked to in evaluating a race-based policy's compliance with the Equal Protection Clause is its flexibility. See, *e.g.*, *United States* v. *Paradise*, 480 U.S. 149, 171 (1987). The University's rigid, inflexible provision of a 20-point bonus to every member of a preferred race cannot be squared with this requirement and ignores the Equal Protection Clause's requirement that the government treat people as individuals. See, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 911 (1995) ("The idea is a simple one: At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.") (citations omitted). As the Eleventh Circuit held in reviewing a similar race-based university admissions policy, "[a] race-based admissions policy still must ensure that, even when using race as a factor, the weight accorded that factor is not subject to rigid or mechanical application, and remains flexible enough to ensure that each applicant is evaluated as an individual and not in a way that looks to her membership in a favored or disfavored racial group as a defining feature of her candidacy." *Johnson* v. *Board of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1253-1254 (11th Cir. 2001).

The University's current admissions program is the antithesis of such a flexible program. It mechanically awards all preferred minorities a 20-point bonus on their selection index score—an enormous racial preference roughly equal to a full grade point (on a 4.0 scale), see Pet. Lodging 40, 49—without regard to their background, academic performance, life experience, or

overall contribution to the educational diversity of the student body.

This rigid race-based bonus reveals just how dominant race is in the University's admissions system. Other factors related to educational diversity are given far less weight. The University, for example, awards a maximum of only 6 points for being from an "Underrepresented Michigan County" and only 2 points for being from an "Underrepresented State." Pet. Lodging 40, 49. The total available points for "Personal Achievement" is five, as is the total points available for "Leadership [and] Service." *Ibid.* Only one point is awarded to applicants who submitted an "Outstanding Essay." *Ibid.* By comparison, the 20 points mechanically awarded to preferred minorities based solely on race is an enormous preference.

The University's rigid, mechanical approach to considering race is incompatible with the need for flexibility in the admissions process and the requirement that all applicants be treated as individuals, not merely as members of a racial group. See *Johnson*, 263 F.3d at 1253-1256; see also *Croson*, 488 U.S. at 508 ("[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief * * * cannot justify a rigid line drawn on the basis of a suspect classification."); *Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."). Regardless of the interest it seeks to achieve, the University's automatic, inflexible, and disproportionate emphasis on race cannot be reconciled with this Court's precedents.

5. The University's race-based admissions policy unfairly burdens innocent third parties

The Court has recognized that the "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance" in part because "education provides the basic tools by which individuals * * * lead economically productive lives to the benefit of us all." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982) (quoting *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923)). It has also explained that government should not impose "barriers presenting unreasonable obstacles to advancement on the basis of individual merit" since "the promise of equality under the law [ensures] that all citizens, regardless of race, ethnicity or gender, have the chance to take part." *Plyler*, 457 U.S. at 222; *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (O'Connor, J., concurring); *Georgia* v. *McCollum*, 505 U.S. 42, 59 (1992) (quoting *Ristaino* v. *Ross*, 424 U.S. 589, 596 n.8 (1976)).

The University's discriminatory admissions criteria unfairly burden qualified applicants not subject to its preference by accepting favored minority candidates who have lesser objective qualifications. As the Court has explained, "[t]he exclusion of even one [person] for impermissible reasons harms that [individual] and undermines public confidence in the fairness of the system." *J.E.B.*, 511 U.S. at 142 n.13; see *Bakke*, 438 U.S. at 361 (opinion of Brennan, White, Marshall & Blackmun, JJ.) (noting that "advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of an individual").

CONCLUSION

The judgment of the district court holding that the race- and ethnic-based undergraduate admissions program is constitutional should be reversed.

Respectfully submitted.

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